MALAYSIAN INDUSTRIAL DEVELOPMENT FINANCE BHD

v.

YONG KAH LEE

HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN YUNUS J
[CIVIL SUIT NO: D6-22-1230-99]
19 OCTOBER 2004

CIVIL PROCEDURE: *Discontinuance - Whether discontinuance effective - Whether notice of discontinuance served on defendant - Whether service of notice mandatory - Rules of the High Court 1980, O. 21 r. 2(1), O. 62 rr. 1(1), 6(1)*

CIVIL PROCEDURE: *Summary judgment - Triable issue - Whether proved - Whether plaintiff's previous suit against defendant still subsisting - Whether notice of discontinuance served on defendant - Rules of the High Court 1980, O. 21 r. 2(1), O. 62 rr. 1(1), 6(1)*

This was the plaintiff's appeal against the dismissal of its application for summary judgment against the defendant. The issue was whether the defendant succeeded in showing a triable issue by reason of no service of notice of discontinuance of a previous similar suit filed by the plaintiff against the defendant.

Held (dismissing the appeal):

[1] Summary judgment could not be granted to the plaintiff as the defendant had succeeded in showing that there was a triable issue – the triable issue being – whether the notice of discontinuance filed by the plaintiff in a previous suit against the defendant pursuant to O. 21 r. 2(1) of the Rules of the High Court 1980 ('the RHC') was duly served on the defendant. There was no evidence at all to show service of the notice of discontinuance on the defendant or receipt of the same by the defendant. Service of a notice of discontinuance is mandatory. If the court were to make a finding of fact at the conclusion of the trial that there was no service of the said notice of discontinuance, then the notice of discontinuance was bad in law. If the notice of discontinuance was bad in law, then as a matter of law there was no

discontinuance of the previous suit meaning that the previous suit had not come to an end but was still alive. If the previous suit was still subsisting then the plaintiff by filing the present suit was guilty of committing a multiplicity of proceedings. The trial court has the power to dismiss or stay the proceedings of the present suit if satisfied that there is a multiplicity of proceedings or that the matter between the parties is *res judicata* and that the present suit ought not to be continued. (pp 770 f & 774 c, e-h)

Legislation referred to:
Courts of Judicature Act 1964, Schedule, para 11
Rules of the High Court 1980, O. 14, O. 21 r. 2(1), O. 62 rr. 1(1), 6(1), 9

For the plaintiff - T Sagadevan; M/s Shearn Delamore & Co
For the defendant - K Shanti; M/s Ling Theng Bok

Reported by Usha Thiagarajah

JUDGMENT

Hishamudin Yunus J:
This is an appeal by the plaintiff against the decision of the learned senior assistant registrar given on 22 May 2001. The senior assistant registrar, in her decision, had dismissed the plaintiff's application for an O. 14 summary judgment against the defendant.

I have dismissed the appeal with costs, and I now give my grounds.

In my judgment, summary judgment cannot be granted to the plaintiff as the defendant has succeeded in satisfying me that there is a triable issue. And the triable issue is: Whether the notice of discontinuance filed by the plaintiff in a previous suit pursuant to O. 21 r. 2(1) of the Rules of the High Court 1980 (the 'RHC'), which is also a suit by the plaintiff against the defendant, and involving the same cause of action, has been duly served on the defendant by the plaintiff, as required by the RHC.

To appreciate the issue, it is important to know the background facts.

In the present case, the plaintiff's claim against the defendant is for, *inter alia*, a sum of RM2,858,326.30, a claim pursuant to a bank guarantee. It is not disputed that the defendant had stood as guarantor in respect of a loan given by the plaintiff to a borrower, a company known as Lian Huat

Seng Plastic Industries Sdn Bhd (hereinafter referred to as 'the borrower'). It is alleged by the plaintiff that the borrower defaulted on the loan, and that the defendant, upon demand by the plaintiff, had refused to honour his obligation as a guarantor under the guarantee.

Now, previously, before the plaintiff filed the present suit in 1999, the plaintiff had, in 1989, already filed a writ action against the defendant (hereinafter shall be referred to as the '1st suit') in respect of the same loan and the same guarantee. This first suit, filed in the High Court of Kuala Lumpur (Commercial Division), is known as Suit No. D5-22-1650-1990. But this 1st suit is not against the defendant alone. It was against the defendant (as guarantor), the borrower and the two other guarantors.

Subsequently, some eight years later, the plaintiff decided to withdraw its action against the defendant in the 1st suit. So, the plaintiff filed a notice of discontinuance as required by O. 21 r. 2(1) of the RHC on 30 September 1997. The plaintiff in its affidavits does not give any reason for the discontinuance.

Then, some one and half years later after the filing of the notice of discontinuance, the plaintiff, on 30 April 1999, filed the present writ action against the defendant, and this time against the defendant alone. It is not disputed – and this is pertinent – that the cause of action against the defendant in the present suit is the same as the cause of action against him in the 1st suit.

Order 21 r. 2(1) of the RHC stipulates:

> **Discontinuance of action, etc., without leave.**
>
> 2. (1) The plaintiff in an action begun by writ may, without the leave of the Court, discontinue the action, or withdraw any particular claim made by him therein, as against any or all of the defendants at any time not later than 14 days after service of the defence on him or, if there are two or more defendants, of the defence last served, by serving a notice in Form 36 to that effect on the defendant concerned.

It is not disputed that in the 1st suit the defendant did not file any statement of defence and that on the facts O. 21 r. 2(1) applies to the plaintiff's notice of discontinuance.

Now, it is to be observed that under the rule, by reason of the words:

> by serving a notice in Form 36 to that effect on the defendant concerned.

the notice of discontinuance had to be served by the plaintiff on the defendant. And O. 62 r. 1(1) and r. 6(1) of the RHC provides that the service was to be effected either by personal service, or by any of the following means:

(a) by leaving the notice of discontinuance at the proper address of the defendant;

(b) by prepaid registered post; or

(c) by such other means as the court might direct.

Further, O. 62 r. 9 prescribes for the filing of an affidavit of service, after the service of the notice of discontinuance. The provision reads:

> **9. Affidavit of service.**
>
> An affidavit of service of any document must state by whom the document was served, the day of the week and date on which it was served, where it was served and how and must be in one of the forms in Form 137.

Now, was the notice of discontinuance served by the plaintiff on the defendant?

It is the contention of the defendant that the notice of discontinuance was not served on him and that he was not aware of the discontinuance of the 1st suit; and that all the while he was under the impression that the 1st suit was still alive.

The plaintiff, on the other hand, contends otherwise. It is alleged by the plaintiff that the notice had been served on the defendant.

Now, in my judgment, when the defendant denies having had knowledge of the notice of discontinuance, it is then incumbent on the plaintiff to furnish particulars of the service of the notice together with the necessary supporting documents.

However, in the present case, the plaintiff, besides failing to file any affidavit of service as required by O. 62 r. 9, also did not state in its supporting affidavits by whom the notice of discontinuance was served, the day and date and in what manner the notice was served on the defendant. Nor was any supporting document exhibited in the supporting affidavits. In para. 5 of the plaintiff's affidavit at encl. 10, the plaintiff's general manager merely averred as follows:

> 5. Saya merujuk kepada perenggan 25 Afidavit Defendan. Saya dinasihati peguamcara Plaintif yang mana saya sesungguhnya percaya sebagai benar bahawa guaman sivil pertama tersebut tidak "hidup" lagi seperti yang dideposkan oleh Defendan. Peguamcara Plaintif telah pada 30.9.97 menfailkan notis pemberhentian di dalam kes tersebut. Dilampirkan di sini dan ditandakan sebagai eksibit "KCG-6" adalah sesalinan Notis Pemberhentian bertarikh 30. 9. 97 dan surat-surat penyampaian Notis tersebut. Sebagai tambahan kepada pemfailan, peguamcara Plaintif telah juga menghantar sesalinan Notis Pemberhentian tersebut kepada Penolong Kanan Pendaftar Mahkamah Tinggi Dagang 5.

And a similar vague averment is repeated by the said deponent in para. 4 of his affidavit at encl. 14.

All that the plaintiff could adduce in its affidavits are a copy of the notice of discontinuance and a copy of a covering letter dated 30 September 1997 from the plaintiff's solicitor to the defendant (see exh. KCG-6 of encl. 10) which reads:

> REGISTERED
>
> Dear Sir,
>
> RE: LIAN HUAT SENG PLASTIC IND. SDN BHD
>
> We enclose herewith a copy of the 'Notis Pemberhentian' dated 30 September 1997 by way of service upon yourself.
>
> Kindly acknowledge receipt.

It is observed that despite the word 'REGISTERED' in the above letter, there is no document (such as the usual post office 'registered letter' receipt/slip) exhibited in the plaintiff's affidavits to show that the letter was indeed sent by registered post. Also, despite the word:

> We enclose herewith a copy of the 'Notis Pemberhentian'

in the above letter, yet I do not find any copy of 'Notis Pemberhentian' attached to the above copy of the covering letter KCG-6 (the single 'Notis Pemberhentian' that is also exhibited as exh. KCG-6 is merely intended to show that such a notice was filed in court by the plaintiff). Again, despite the words:

> Kindly acknowledge receipt

at the end of the letter, yet there is no documentary evidence (or, indeed, any form of evidence) adduced by the plaintiff to show acknowledgement of receipt by the defendant. In short, there is no evidence at all to show service of the notice of discontinuance on the defendant or receipt of the same by the defendant. Mere production of the above covering letter cannot be taken as evidence of service of the notice of discontinuance on the defendant: at best it is only evidence that such a letter was written by the plaintiff.

Hence, in the present case, there is a triable issue as to whether or not the notice of discontinuance was served by the plaintiff on the defendant as required by the O. 21 r. 2(1) read with O. 62 rr. 1(1) and 6(1) of the RHC.

I hold that this is a triable issue because, in my view, service of the notice of discontinuance is mandatory. Since service of the notice is mandatory, therefore, if the court were to make a finding of fact at the conclusion of the trial that there was no service of the said notice of discontinuance, then the notice of discontinuance is bad in law. If the notice of discontinuance is bad in law, then, as matter of law, there has been no discontinuance of the 1st suit, meaning that the 1st suit had not come to an end but is still alive. And if the 1st suit is still subsisting, then, the plaintiff, by filing the present suit, is guilty of committing a multiplicity of proceedings. And the trial court has the power to dismiss or stay the proceeding of the present suit if satisfied that there is a multiplicity of proceedings and that the present suit ought not to be continued. Paragraph 11 of the Schedule to the Courts of Judicature Act 1964 provides:

> **11. *Res judicata***
>
> Power to dismiss or stay proceedings where the matter in question is *res judicata* between the parties, or where by reason of multiplicity of proceedings in any court or courts the proceedings ought not to be continued.

[Appeal dismissed with costs]